Supreme Court, U.S.
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No. _____

* * *

IN THE UNITED STATES SUPREME COURT

OCTOBER 1996 TERM

* * *

LATREESE TABB,

Petitioner

V.

DILLARD DEPARTMENT STORES, INC,

Respondent

* * *

ON APPEAL FROM THE UNITED STATES

COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

AMENDED

PETITION FOR WRIT OF CERTIORARI

* * *

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48 pp

QUESTIONS PRESENTED FOR REVIEW

POINT ONE: DID THE TRIAL COURT ERR IN GRANTING THE DEFENDANT'S MOTION FOR JUDGEMENT (N.O.V.) ON THE EMPLOYMENT DISCRIMINATION CLAIM?

POINT TWO: DOES THE PROPRIETY OF THE COURT OF APPEALS' ACTION WITH RESPECT TO THE INTENTIONAL INFLICTION OF MENTAL DISTRESS CAUSE OF ACTION DEPEND UPON THE WRONGFUL RESOLUTION OF THE DISCRIMINATION CLAIM?

POINT THREE: DID THE APPELLATE COURT ERR BY REVERSING THE TRIAL COURT'S RULING ON THE INTENTIONAL INFLICTION OF MENTAL DISTRESS CLAIM?

POINT FOUR: DO THE RULINGS OF THE TRIAL COURT AND THE COURT OF APPEALS CONFLICT WITH A SUPREME COURT DECISION, CONFLICT

WITH DECISIONS OF OTHER COURTS OF APPEAL, OR ARE THEY ERRORS WHICH SO FAR DEPART FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONS SUCH A DEPARTURE BY THE TRIAL COURT, THAT IT CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

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JURISDICTION OF THE COURT

The order sought to be reviewed is the Order on appeal to the Fifth Circuit entered on April 22, 1997. A Motion for Rehearing was denied on May 14, 1997. This Court has jurisdiction based on the appropriate jurisdiction of the Fifth Circuit Court of Appeals. The Fifth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. Section 1251. Notice has been served on counsel of record for Respondent pursuant to Rule 29 (.3).

STATUTES AND AUTHORITIES

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER VI--EQUAL EMPLOYMENT OPPORTUNITIES

Current through P.L. 104-333, approved 11-12-96

s 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

....

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this

subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

STATEMENT OF THE CASE

This cause was filed in State Court, and removed to Federal Court by the Defendant via diversity jurisdiction. This case was tried to a jury, and on Nov. 27, 1995, the jury returned a verdict for Plaintiff on two causes of action, an employment discrimination action under Federal law and an intentional infliction of emotional distress action under Texas law. The trial Court, the Honorable Sam Sparks, then granted Defendant's Motion for Judgement as a Matter of Law, (carried forward by the Court from a Motion for Directed Verdict) on the employment discrimination claim, but left the state claim intact.

Defendant appealed to the Fifth Circuit. Plaintiff cross-appealed the employment discrimination part of the Judgement. After oral argument, the Fifth

Circuit affirmed the Trial Court's order regarding the employment discrimination claim, and reversed the Trial Court with respect to the state law claim, on April 22, 1997. Plaintiff timely requested a rehearing, which was denied on May 14, 1997.

ARGUMENT

POINT ONE: DID THE TRIAL COURT ERR IN GRANTING THE DEFENDANT'S MOTION FOR JUDGEMENT (N.O.V.) ON THE EMPLOYMENT DISCRIMINATION CLAIM?

The trial Court, and the Appellate Court on review, used a standard of review which places an incorrect burden of proof on the Plaintiff. The correct standard on review is whether enough evidence exists for the fact finder to infer that race was a motivating factor in the challenged employment decision. 42 U.S.C.A. Section 2000e-2(m). It is not within the province of the reviewing court to disturb a jury finding supported by the record even if the reviewing court would have been inclined to rule differently had the matter been presented to it in the first instance. Polanco v. City of Austin, 78 F.3d

968 (5th Cir. 1996) Where a jury chooses between two clearly identifiable factual stories in a discrimination case, jury's verdict must be affirmed. Polanco.

Defendants are required to put forward reasons for the challenged practice or decision. TDCA v. Burdine, 450 U.S. 248 (1981), McDonnell Douglas v. Green, 411 U.S. 792 (1973) Juries are not required to believe these reasons. The mere fact that a defendant has stated a reason which, if believed, would excuse the challenged conduct, does not automatically entitle him to victory upon review.

In reviewing a jury verdict under Rule 54, a court does not act as an independent factfinder. A court may not set aside a jury verdict merely because it disagrees with the findings of the jury. Davenport v. DeRobertis, 844 F 2d 1310, cert.den. 109 S.Ct. 260. Instead, the

Court may only address the issue of the legal sufficiency of the evidence. The correct standard is that a motion for judgement N.O.V. may not be granted unless reasonable minds could not differ as to the conclusions to be drawn from the evidence. Boeing v. Shipman, 411 F.2d 365 (5th Cir.1969) (en banc) In Re Lewis, 845 F. 2d 624, Brock v. Merril-Dow, 874 F.2d 307, mod. 884 F.2d 166, reh den 884 F.2d 167, reh. den. 886 F.2d 1314, cert. den. 110 S.Ct. 1511, Seeney v. Citgo, 848 F.2d 664. The Court must consider all the evidence, but it must be considered in the light most favorable to the verdict winner and with all reasonable inferences drawn for the prevailing party. Reveley v. Berg, 601 F. Supp.44, Medtronic v. Intermark, 799 F.2d 734, cert.den. 107 S.Ct. 816. Farpella-Crosby v. Horizon 97 F.3d 803 (5th Cir. 1996) In fact, it is error for

a district court to grant a motion J.N. O.V. if conflicting inferences can be drawn from the evidence. City Nat. Bank v. U.S., 907 F.2d 536. If there is substantial evidence, that is, evidence of such quality and weight that reasonable and fair minded jurors, in exercise of impartial judgement, might reach different conclusions, then Judgement N.O.V. is improper. Zaklama v. Mt. Sinai, 842 F. 2d 291, Arenson . Southern University, 911 F.2d 1124 (5th Cir. 1990) The Court standard, when reviewing the findings, is whether the employee tendered factual evidence that could lead a jury to reasonably conclude that the reason was pretextual. Montgomery v. Brookshire, 880 F. Supp 483.

In this case, the trial Court found that the Plaintiff had produced substantial evidence that the proffered reasons

were not the true reasons. Then, the trial Court found, somewhat facetiously, that conflicting inferences might be drawn from the evidence presented. Then the Court used the "greater enterprise test" to rule that the Plaintiff had not met their burden of proof.

The "greater enterprise" standard, as stated by the Supreme Court, merely explains why Plaintiffs are not entitled to judgement as a matter of law when they offer convincing or even overwhelming proof that the proffered reasons for the challenged conduct are false. Hicks v. St. Mary's, 113 S.Ct. 2747 (1993). The jury, when not convinced that the proffered reasons are true, may infer that some other reason was the true reason for the challenged practice. They do not necessarily have to infer a violation of Title VII. However, the jury is allowed to

infer intentional discrimination where they disbelieve the reasons put forward by the defendant, particularly if disbelief is accompanied by a suspicion of mendacity. Hicks v. St. Mary's, 113 S.Ct. 2747 (1993).

The "greater enterprise test" was used by the trial court in this cause to not allow the inference of discrimination even after finding substantial proof that the proffered reasons were false. The trial court did not draw all reasonable inferences for the prevailing party as it is required to do, Reveley v. Berg, 601 F. Supp.44, Medtronic v. Intermark, 799 F.2d 734, cert.den. 107 S.Ct. 816, and it did grant a Judgement N.O.V. even after specifically holding that conflicting inferences might be drawn from the evidence, as it is not allowed to do. City Nat. Bank v. U.S., 907 F.2d 536. The "greater en-

terprise test", as used by the trial court, contradicts the Boeing v. Shipman instructions for review. The "greater enterprise test", as used by the trial Court, usurps the authority of the fact finder, imposes an unfair and unlawful burden of proof on the Plaintiff and is an error.

The St. Mary's opinion, and the Montgomery opinion, are a necessary and logical extension of Boeing v. Shipman, supra. If a jury is permitted to infer Fact B from Fact A, then Boeing holds that such inference must be respected and affirmed. The proper question for a sufficiency review on this point should then turn to the sufficiency of the evidence of Fact A.

The McDonnell Douglas framework for analysis and the St. Mary's case specifically allow a jury to infer discrimination if they do not believe the proffered rea-

sons for the challenged employment practice. (See also Walker v. Correctional, 886 F. Supp 515 W.D.Pa (1995)) Under Boeing, therefore, in any case in which the Plaintiff has produced substantial evidence that the proffered reasons are not the true reasons, a jury finding of discrimination should be upheld. In this case, the Trail Court found, and the Defendant did not contest on review, that the Plaintiff had produced substantial evidence that the proffered reasons were not the true reasons. Since that is the case, the jury finding, inferring a discriminatory intent from the substantial evidence, should be affirmed.

POINT TWO: DOES THE PROPRIETY OF THE COURT OF APPEALS' ACTION WITH RESPECT TO THE INTENTIONAL INFLICTION OF MENTAL DISTRESS CAUSE OF ACTION DEPEND UPON THE WRONGFUL RESOLUTION OF THE DISCRIMINATION CLAIM?

If the trial Court was had ruled correctly on the discrimination claim, the Court of Appeals would have viewed the Defendant's appeal in a different light. Under Texas law, mere discharge from employment does not rise to "outrageous behavior". Wornick v. Casas, 856 S.W.2d 732 (Tex 1993). Under Texas law, if an actor does no more than insist on its legal rights, there is no liability for intentional infliction of mental distress. Reid v. Sears, 790 F.2d 453 (6th Cir. 1986). However, if it discriminated, the Defendant cannot claim that it did no more than insist on its legal rights in terminating Plaintiff, since there are specific

Federal laws against such actions.

Since evidence was presented that the proffered reason for the Plaintiff's termination was false, the jury was entitled to infer a racially discriminatory motive in the termination of Plaintiff. St. Mary's v. Hicks, supra. Had such a judgement remained intact before the Court of Appeals, it would not have reversed the trial Court's judgement for Plaintiff on the intentional infliction of mental distress issue. Therefore, a correct review of the intentional infliction of mental distress cause cannot occur before this Court rules on the discrimination cause.

POINT THREE: DID THE APPELLATE COURT ERR BY REVERSING THE TRIAL COURT'S RULING ON THE INTENTIONAL INFLICTION OF MENTAL DISTRESS CLAIM?

The trial court properly denied the Defendant's Motion for Judgement and entered judgement against the Defendant on the issue of intentional infliction of emotional distress. With respect to "outrageous conduct", the Defendant was not entitled to judgement as a matter of law. Under Texas law, mere discharge from employment does not rise to "outrageous behavior". Wornick v. Casas, 856 S.W.2d 732 (Tex 1993). Under Texas law, if an actor does no more than insist on its legal rights, there is no liability for intentional infliction of mental distress. Reid v. Sears, 790 F.2d 453 (6th Cir. 1986).

This case is distinguishable from the

cited cases. First, none of the cited cases have anything to do with race discrimination. Since there are specific federal statutory restrictions against discharge for race reasons, if it discriminated, the Defendant cannot claim that it did no more than insist on its legal rights in terminating Plaintiff.

The jury found that the conduct in this case was outrageous. The trial court properly found that the jury finding was supported by factually sufficient evidence, and denied the Defendant's motion for judgement. As discussed above, if there is substantial evidence, that is, evidence of such quality and weight that reasonable and fair minded jurors, in exercise of impartial judgement, might reach different conclusions, then Judgement N.O.V. is improper. Zaklama v. Mt. Sinai, 842 F. 2d 291. Therefore, if

from the facts presented, and from the inferences reasonably drawn from the facts, a rational trier of fact could have found for the Plaintiff, the trial court must uphold the verdict.

The evidence adduced at trial, together with the permissible inferences, were enough to convince reasonable and fair jurors in the exercise of impartial judgement, that the conduct was outrageous. Since evidence was presented that the proffered reason for the Plaintiff's termination was false, the jury was entitled to infer a racially discriminatory motive in the termination of Plaintiff. St. Mary's v. Hicks, supra. A reasonable juror could have concluded that a wrongful termination motivated by race was by itself outrageous.

There was additional evidence. Two warrant checks were conducted by Defen-

dant's employees on the Plaintiff. One loss prevention agent admitted that warrant checks are not normally available to employers. Defendant arranged for Plaintiff to be arrested in the store. Both loss prevention agents testified that the arrest could have been handled another way. Plaintiff was handcuffed, and taken into a small loss prevention office covered with pictures of minorities. Plaintiff was searched and her purse rifled by another loss prevention agent. Plaintiff was escorted from the store, in full view of other employees and customers, under armed and uniformed guard. The acts complained of occurred in a short time frame and were arranged or orchestrated by the store manager Robert Boyce and other employees. It was the purposeful timing of these events to occur one right after the other that produced great mental distress.

Even if it might be said that each separate act did not rise to the level of outrageousness required by the case law, the orchestration of such actions to produce maximum distress is outrageous. Furthermore, the jury found that the conduct was motivated by race discrimination. Under these facts, a rational juror could have concluded that such conduct was outrageous.

Since the issue of outrageousness was both properly presented to the jury and supported by facts sufficient to convince a rational juror, the trial court properly entered judgement against the Defendant. The Appellate Court, on review, acted as a fact finder and ignored the findings of the jury and the trial Court.

POINT FOUR: DO THE RULINGS OF THE TRIAL COURT AND THE COURT OF APPEALS CONFLICT WITH A SUPREME COURT DECISION, CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL, OR ARE THEY ERRORS WHICH SO FAR DEPART FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS, OR SANCTIONS SUCH A DEPARTURE BY THE TRIAL COURT, THAT IT CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION?

The decision of the trial Court, and the Court of Appeals, conflicts with decisions of this Court. In discrimination cases, defendants are required to put forward reasons for the challenged practice or decision. TDCA v. Burdine, 450 U.S. 248 (1981), McDonnell Douglas v. Green, 411 U.S. 792 (1973) Juries do not have to believe them. Juries are allowed to infer intentional discrimination where they disbelieve the reasons put forward by

the defendant, particularly if disbelief is accompanied by a suspicion of mendacity. Hicks v. St. Mary's, 113 S.Ct. 2747 (1993). The trial Court in this cause, and the Appellate Court on review, did not allow the jury to infer discrimination even though the trial Court specifically found that there was substantial evidence to support the jury's disbelief of the proffered reason.

Interpreting the Court's holding in Hicks v. St. Mary's, 113 S.Ct. 2747 (1993) has been difficult for the lower courts. There is substantial conflict between lower courts on this point, and also in age discrimination cases addressing the analogous point. Hairston v. Gainesville, 9 F.3d 913 (11th Cir. 1993); Maddow v. Proctor, 1997 WL 91128, No. 95-9576 (11th Cir. 3/19/97); Ingels v. Thiokol, 42 F.3d 616 (10th Cir. 1994); Rea v. Martin, 29

F.3d 1450 (10th Cir. 1994); Howard v. BP Oil, 32 F.3d 520 (11th Cir. 1994); Udo v. Tomes, 54 F.3d 9 (1st Cir. 1995); Isenbergh v. Knight-Ridder, 97 F.3d 436 (11th Cir. 1996); Sheridan v. Dupont, 100 F.3d 1061 (3rd Cir. 1996). The Correct standard, in compliance with Hicks v. St. Mary's, should be that if there is substantial evidence that the employer's proffered reasons are false, then a jury is permitted to infer discrimination. This Court should exercise its jurisdiction to address this conflict.

Furthermore, with respect to the correct standard of review, this decision conflicts with several other cases in the Courts of Appeal and the 5th Circuit itself. The correct standard is that a motion for judgement N.O.V. may not be granted unless reasonable minds could not differ as to the conclusions to be drawn

from the evidence. Boeing v. Shipman, 411 F.2d 365 (5th Cir.1969) (en banc) In Re Lewis, 845 F. 2d 624, Brock v. Merril-Dow, 874 F.2d 307, mod. 884 F.2d 166, reh den 884 F.2d 167, reh. den. 886 F.2d 1314, cert. den. 110 S.Ct. 1511, Seeney v. Citgo, 848 F.2d 664. The Court must consider all the evidence, but it must be considered in the light most favorable to the verdict winner and with all reasonable inferences drawn for the prevailing party. Reveley v. Berg, 601 F. Supp.44, Medtronic v. Intermark, 799 F.2d 734, cert.den. 107 S.Ct. 816. Farpella-Crosby v. Horizon 97 F.3d 803 (5th Cir. 1996) In fact, it is error for a district court to grant a motion J.N.O.V. if conflicting inferences can be drawn from the evidence. City Nat. Bank v. U.S., 907 F.2d 536. If there is substantial evidence, that is, evidence of such quality and weight that reasonable

and fair minded jurors, in exercise of impartial judgement, might reach different conclusions, then Judgement N.O.V. is improper. Zaklama v. Mt. Sinai, 842 F. 2d 291, Arenson v. Southern University, 911 F.2d 1124 (5th Cir. 1990), Walker v. Nationsbank, 53 F.3d 1548. Where a jury chooses between two clearly identifiable factual stories in a discrimination case, jury's verdict must be affirmed. Polanco v. City of Austin, 78 F.3d 968 (5th Cir. 1996).

In this case, the trial Court found that the Plaintiff had put on substantial evidence that the Defendant's proffered explanations were not true. The trial Court found that conflicting inferences could be drawn from the evidence. However, the trial Court did not consider all the evidence in the light most favorable to the verdict winner and with all reasonable

inferences drawn for the prevailing party. The trial Court did not permit the jury to choose one of the two clearly identifiable factual stories in this discrimination case. This conduct conflict with other cases among the Courts of Appeal, and is such an error which so far departs from the usual and accepted course of judicial proceedings, that it calls for an exercise of this Court's power of supervision.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Petitioner respectfully requests that this Honorable Court grant a Writ of Certiorari and hear this appeal on its merits, and other such relief to which she may be entitled.

Respectfully Submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LATREESE TABB, Plaintiff	§ § §	
V.	§ §	NO. A 95-CV-257 SS
DILLARD'S, INC., Defendant	§ §	

ORDER

BE IT REMEMBERED on this the _____ day of December 1995, the Court reviewed the file in the above-styled and numbered cause and particularly Plaintiff Latreese Tabb's Motion for Judgment Under Rule 58[#59], Defendant Dillard Department Store, Inc.'s (Dillard's) Renewed Motion for Judgment as a Matter of Law After Trial and, In the Alternative, Motion for New Trial [#58], and Plaintiff's response to Defendant's Motion for Judgment [#60].

This cause was heard by a jury on November 27 through 29, 1995, and the jury awarded damages to the Defendant in the amount of $5,850 on her claim of race discrimination, $4,500 on her claim of intentional infliction of emotional distress, and $5,000 on her claim for punitive damages. After trial, the Court indicated to the parties that it was inclined to enter judgment as a matter of law on the race discrimination claim and would entertain briefs addressing the issue. Both parties filed briefs addressing this issue as well as the sufficiency of the evidence on the intentional infliction of emotional distress claim. Having carefully reviewed the post-trial briefs and the evidence presented during trial, the Court concludes that the law requires entry of judgment as a matter of law in favor of the Defendant on the race discrimination

claim, The jury's verdict on intentional infliction of emotional distress and punitive damages stands.

Standard of Review

The Fifth Circuit articulated the modern standard of review of motions for judgment as a matter of law in 1969:

> On motions for directed verdict and for judgment notwithstanding the verdict[1], the Court should consider all of the evidence--not just that the evidence which supports the non-mover's case--but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded

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[1]These motions were subsumed under the modern Rule 50 of the Federal Rules of Civil Procedure and are both now properly referred to as "motions for judgment as a matter of law.."

> men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions ... should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Boeing Co. v., Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969); *accord Leatherwood v. Houston Post Co..*, 59 F.3d 533, 535 (5th Cir. 1995); *Tutor v., Ranger Ins. Co.*, 804 F.2d 1395, 1397 (5th Cir. 1986).

Race Discrimination

Although the Fifth Circuit standard leaves a gray area on the spectrum between the point at which granting the motion is

certainly proper--where the evidence is "strongly and overwhelmingly" in favor of the movant--and the point at which granting the motion is certainly improper--where there is "a conflict in substantial evidence"--the issue of whether to grant the Defendant's motion in this particular case is not gray at all. The Plaintiff failed to present evidence of race discrimination, and thus the Defendant's motion should be granted to the extent it seeks judgment as a matter of law in its favor on the Plaintiff's race discrimination claim.

In a Title VII case, a plaintiff raises a presumption of unlawful discrimination by presenting a *prima facie* case of discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 1094 (1981). The burden of production of evidence, but not of proof,

then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the employment action that, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the action. *Id.* at 254-55, 101 S. Ct. at 1094-95. Meeting this burden rebuts the presumption that the defendant unlawfully discriminated and the presumption completely drops out of the case.

The Plaintiff now has the opportunity to demonstrate that the proffered reason for the employment action was not the true reason and that race was. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742,2747 (1993); *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537, 542 (5th Cir. 1994). The Supreme Court has made clear that simply persuading the jury that the reason given by the defendant for the action is not the true reason does not conclusively estab-

lish that the defendant discriminated on the basis of race. Rather, it "becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination." *Id.* at 2752. In other words, the burden of proof and persuasion on the ultimate fact of whether the employer took the action by reason of a prohibited factor, *e.g.*, race, remains at all times on the plaintiff. *Burdine*, 450 U.S. at 255-56, 101 S. Ct. at 1094-95; *Rhodes*, 39 F.3d at 542.

Here there was simply no evidence of race discrimination. The Defendant did meet its intermediate burden of production by stating a legitimate, nondiscriminatory reason for its termination of the Plaintiff--that Plaintiff failed to accurately complete her application and misrepresented her history in the employment interview

regarding her former employment with Foley's, coupled with the report received by Dillard's that the Plaintiff had recently been terminated by Foley's for suspicion of theft, was certainly a legitimate, nondiscriminatory reason for termination. And the Plaintiff did admit sufficient evidence to support a finding that the express reason given by Dillard's for the termination was not the real reason. However, the plaintiff failed in the "greater enterprise"--the enterprise of proving that the true reason for her termination, or even *a* reason, was race discrimination.

There evidence established that actions taken with regard to the PLAINTIFF were extraordinary. Immediately after her termination from Dillard's, an off-duty Travis County sheriff's deputy working as a Dillard's security officer arrested Ms.

Tabb in a public area of Dillard's for a nine-year-old misdemeanor warrant for theft by check between $20 and $200 and took her directly to jail. In the experience of the witnesses and to their knowledge, no other warrant check had ever been run on any employee by another Dillard's employee.[2] No other Dillard's employee had ever, immediately upon termination, been arrested by an off-duty deputy sheriff working as a Dillard's employee, much less for a nine-year-old warrant. Further, Juanita Alcocer of the Austin Human Rights Commission testified that of nineteen other Dillard's employees who filled out their applications in a similarly "improper" manner to the way Plaintiff

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[2]Granted, however, never before had an off-duty deputy sheriff working as a security guard at Dillard's ever received a tip that another Dillard's employee had recently been terminated by another retail employer for theft..

filled out hers, none were ever terminated. None of this, however, necessarily has anything to do with race. The testimony of Ms. Alcocer tends to prove that the reason for termination proffered by the Defendant is false, and the other evidence tends to support a case for intentional infliction of emotion distress, an entirely separate issue to be discussed momentarily. But it does not establish evidence from which an inference of racial discrimination may be made, Perhaps the Plaintiff had insulted the employees in question at a company party and they sought revenge; perhaps the Plaintiff was an extraordinary salesperson and her superiors felt their job security threatened; perhaps the Plaintiff's laugh irritated them. All are ridiculous and repugnant reason to terminate someone, yet legal in an at-will employment situation such as

this one. And the evidence supports these inferences just as much as they support and inference of race discrimination. IN other words, to infer from the evidence that the Defendant terminated the Plaintiff because she is black is just to make an arbitrary guess.

Indeed, some testimony presented by the Plaintiff might be construes as indicating that Dillard's treats white and black people differently. The weight of the evidence taken as a whole, however, is quite insufficient to support a finding that the Defendant terminated the Plaintiff because of her race; the only possible evidence of race discrimination either was irrelevant to Dillard's treatment of its employees, had nothing whatsoever to do with the people involved in this case, or both.

The weakest of such testimony estab-

lished that photos of persons previously arrested for criminal trespass, which were posted in the security office, were somewhere between 75% to virtually all minorities. Even assuming, for the sake of argument, that such a display indicates racial bias against minorities on the part of Dillard's, it simply has nothing to do with Dillard's attitudes toward its employees, much less its attitude toward the Plaintiff in particular.

And the same may be said of the allegedly discriminatory statements made by Robert Boyce, the supervisor who terminated the Plaintiff, in training sessions, Mr. Boyce testified that in training sessions he tells new employees that one no longer can discern thieves by outward appearance. the Plaintiff testified that she took this to mean that no longer are all thieves minorities. Whatever infer-

ence of racial bias this statement can support, if any, it, too, is irrelevant to the Defendant's treatment of its employees in general or the plaintiff in particular.

Rosalind Carr, a former employee at the same Dillard's store in which Plaintiff had worked, testified that she believed she had been terminated because she was black, rather than for falsifying a receipt as the Defendant had claimed. Ms. Carr's perception of what happened in her case bears very little on what happened in the plaintiff's case; even accepting Ms. Carr's conclusion as to her termination, to infer from that situation that Robert Boyce, the supervisor of the Plaintiff but never of Ms., Carr, decided to terminate the Plaintiff because she is black would require a mental leap that even the intellectual Rigbys, Comenicis, and Korbuts of the work could not perform.

Finally, the plaintiff's own testimony that she believed she was terminated because of her race is insufficient to support an inference of racial discrimination. People are not entitled to recover judgments simply because they honestly *believe* they have been wronged; they must prove it. Truly, often it is difficult to muster up enough evidence of an actual wrongdoing to prove it occurred, especially when a state if mind is at issue. The law has evolved dramatically to take account of such difficulties, often allowing for reasonable inferences to be drawn from circumstantial evidence when no"smoking gun" can be found. Here, for example, a jury could infer racial discrimination from a pattern or practice of discrimination. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36, 97 S. Ct. 1843, 1854-55 (1977). But the Plaintiff

did not establish any such pattern or practice. To prove her claim by establishing a pattern or practice of discrimination, the Plaintiff would need to show that racial discrimination was the Defendant's "standard operating procedure--the regular rather that the unusual practice." *Id.* the Plaintiff's subjective belief, Ms. Carr's subjective belief, the photos on the wall, the training instructions given by Mr. Boyce--all are slim reed, even when amasses, upon which to infer race discrimination and furthermore are, at best, anecdotal instances of racial bias or discrimination. The "mere occurrence of isolated or 'accidental' or sporadic discriminatory acts" is not enough to show a pattern or practice of discrimination. *Id.* at 336, 97 S. Ct. at 1855.

Whether the Defendant fired the Plaintiff because she is black can never

be known with absolute certainty. One thing is certain, however--given the utter lack of evidence on the issue, to find that it did is to simply guess. The Plaintiff did not proffer any statistical or other compelling evidence from which a reasonable jury could find or infer racial discrimination in her case. Rather, she offered only a few subjective personal perceptions and some weak circumstantial evidence of discrimination in unrelated areas of the Defendant's business. There is no conflict in substantial evidence regarding the race discrimination claim, and therefore the Court must lay the jury's verdict on this issue aside and render judgment for the Defendant.

Intentional Infliction of Emotional Distress

The intentional infliction of emo-

tional distress claim is an entirely different matter, however. A reasonable jury could very well find that the Defendants' employees' actions accompanying the Plaintiff's termination were extreme and outrageous and caused her severe emotional distress. A recitation of the evidence bears this out. Robert Boyce, the supervisor who terminated the Plaintiff, when informed of the warrant out for Plaintiff's arrest on November 22, 1993, never requested that the deputy sheriffs execute the arrest warrant. In fact, Boyce, according to his testimony, asked whether the deputy sheriffs could wait until the Plaintiff left the premises before they executed the warrant. However, when they told him they could not wait, that they must execute the warrant immediately when they saw the plaintiff in the store, Mr. Boyce prearranges with deputy LeBlanc to

be waiting outside of Boyce's office for the Plaintiff after the termination meeting.

ON November 23, 1993, the Plaintiff, upon her arrival at work, was brought into Boyce's office and terminated from her employment on the spot without opportunity to respond to any reason for the action., While walking out of Boyce's office, accompanies by her direct supervisor who was unaware of the impending arrest, Ms. Tabb was immediately approached by deputy Alred LeBlanc, a uniformed Travis County deputy sheriff working as security personnel for Dillard's, and was arrested on the spot. After being taken to the security office, wherein she was temporarily handcuffed upon becoming extremely upset, she was led through the public areas and then out of the store by LeBlanc and another unidentified woman. Outside she was placed in the

back seat of an unmarked government automobile, inside a visible metal "cage" used in such vehicles to protect the passengers in the front seat, and driven directly to the county jail.

The Defendant may well have had good reason to fire the Plaintiff. And it may well be that the warrant was, despite being for a nine-year-old misdemeanor, valid and active. But for the Defendant's employees to orchestrate events such that immediately after one of Dillard's employees fired Ms. Tabb, another would approach and arrest her in a public area of the store and send her straight to jail could certainly be considered extreme and outrageous by a reasonable fact finder under the circumstances of this case. The Defendants put Officer LeBlanc on the stand who testified, without objections, that the Texas Code of Criminal Procedure *re-*

quires peace officers to immediately execute warrants upon their confirmation. While the Travis County Sheriff's Department may have its own such policy, the Texas Code of Criminal Procedure contains no such requirement.[3] If the Defendant chooses to employ off-duty Travis County deputy sheriffs to staff its loss prevention department, and chooses to delegate to them discretion over the manner in which to conduct loss prevention,[4] it must take responsibility for the actions of

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[3]Even if the Travis County Sheriff's Department had a policy of immediate arrest, the Court has trouble swallowing the argument that the deputies acted pursuant to that policy. Rather than acting on the information when they received it on November 22, by example by attempting to contact the Plaintiff at her home, they deliberately waited until the following day when the plaintiff came into work to apprehend her.

[4]Robert Boyce testified that while the deputies employed by Dillard's attend the general training session that all employees attend, Mr. Boyce does not give any special training regarding loss prevention to the deputies.

those employees undertaken while working on the clock of the Defendant.

The Defendant disputes this legal conclusion, citing two published Texas cases and one unpublished Fifth Circuit decision in support of its argument that the off-duty deputies acted solely in their capacities as Travis County sheriff's deputies and Dillard's is not responsible for those actions. The Defendant requests the Court to set aside the jury's verdict for the Plaintiff on this issue or, in the alternative, to order a new trial on the ground that the jury charge incorrectly explained the law. The cases are inapposite, however; they merely describe an off-duty deputy's duties in exigent circumstances. The Texas cases note that off-duty deputies have a duty to act when, in their presence or view, injury to person or property by another is

imminent. *see City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W. 2d 374, 377 (Tex. App. --Dallas 1994); *Vernon v. City of Dallas*, 638 S.W. 2d 5, 8-9 (Tex. App.--Dallas 1982, writ ref'd n.r.e.); *see also* TEX. CODE CRIM. PROC. ANN. arts. 6.05, 6.06 (Vernon 1981 & Supp. 1996). If the deputy happens to be working in the private employ of another at the time, he "ceases to be an employee or independent contractor" when the duty to immediately act arises. *Half Price Books, Records, Magazines, Inc.*, 883 S.W .2d at 377. Similarly, in holding that a private employer was not responsible for the actions of its security personnel, the Fifth Circuit was reviewing a situation in which an off-duty deputy was alerted to and observed criminal activity occurring on the premises. *See Moore v. Wal-mart stores, Inc.*, No. 94-20379 (5th Cir. June

30, 1995).

Here, no such exigent circumstance existed. The Dillard's deputies were not observing criminal activity occurring when they took the action they did. Indeed, the alleged criminal activity had occurred nine years earlier according to the information on the face of the warrant. No exigent circumstances presented themselves, as evidenced by the failure of the deputies to act immediately--they deliberately waited after receiving the information about the warrant to arrest Ms. Tabb until she was fired at the store. Moreover, both deputies admitted that the arrest warrant could have been executed in a variety of ways. For example, when the deputies learned on November 22 of the warrant, they could have telephoned Ms. Tab when they learned she was at home with her sick children. They could have tele-

phoned her anytime the next day up until 5:15 p.m., the time she reported for work at Dillard's. They could have informed an on-duty officer not working for Dillard's of the warrant to carry out its execution, Instead, the deputies deliberately chose, in spite of the availability of several less severe options, to arrest Ms. Tabb in a public space while working off-duty in the capacity of security guards for Dillard's. Dillard's cannot avoid the fact that all of the actions taken with regard to Ms. Tabb--the receipt of the phone call from Dillard's, the "involvement check," the warrant confirmation, the decision to arrest, and the arrest itself--were initiated and carried out by its own employees while working on the clock. Put simply, a deputy sheriff's badge is not a blank check absolving an employer of all discretion and responsibility for the actions of

its employee carrying the badge. When, as here, a deputy is off-duty and working for a private employer, and no particular duty to prevent criminal conduct has arisen, the employer cannot escape liability by hiding in the shadow of the deputy's badge.[5]

In conclusion, there was more than sufficient evidence presented for a reasonable jury to find by a preponderance of the evidence that the Defendant intentionally and deliberately caused Ms. Tabb to suffer severe emotional distress, and therefore the Court will not set aside the factual determinations of the jury.

Accordingly, the Court enters the following order:

[5]The Defendant does not dispute in its motion that the evidence presented was sufficient to support a determination that the incident caused Ms. Tabb to suffer severe emotional distress, and the Court concludes that the evidence was indeed sufficient.

IT IS ORDERED that Defendant's Renewed Motion for Judgment as a Matter of Law After Trial and, In the Alternative, Motion for New Trial [#58] is GRANTED IN PART and DENIED IN PART, and a take nothing judgment will be entered on Plaintiff's race discrimination claim.

IT IS FURTHER ORDERED that Plaintiff's Motion for Judgment Under Rule 58[#59] is GRANTED IN PART and DENIED IN PART, and judgment will be entered pursuant to the jury verdict on the intentional infliction of emotional distress and punitive damages claims.

SIGNED on this _____ day of December 1995.

Sam Sparks
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

LATREESE TABB,	§	
Plaintiff	§	—
	§	
V.	§	NO. A 95-CV-257 SS
	§	
DILLARD'S INC.,	§	
Defendant	§	

JUDGMENT

BE IT REMEMBERED on the 27th day of November 1995, the Court called the above-styled and numbered cause for jury selection and trial. The trial concluded on November 29 and the Court submitted the case to the jury. The jury returned a verdict as follows:

Question One:	Yes
Question Two:	A: $5,850; B: $0; C: $0; D: $0
Question Three:	Yes
Question Four:	A: $4,500; B: $0
Question Five:	$5,000.00

Defendant Dillard Department Stores, Inc. moved for judgment as a matter of law after the presentation of the Plaintiff's case, renewed the motion at the conclusion of all the evidence, and filed a motion notwithstanding the verdict. Plaintiff filed a motion for entry of judgment on the jury's verdict. For the reasons detailed in the Court's memorandum order, the Court now enters the following judgment:

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiff Latreese Tabb shall TAKE NOTHING by her cause of action against Dillard Department Stores, Inc. for race discrimination under Title VII of the Civil Rights Act and the Texas Commission on Human Rights Act.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff Latreese Tabb have and recover judgment against Defendant

Dillard Department Stores, Inc. for the total sum of $9,500.00 plus prejudgment interest at a rate of 10% per annum calculated between November 23, 1993 and November 29, 1995, and postjudgment interest at a rate of 5.4% per annum until the judgment is finally and fully paid for which let execution issue.

SIGNED on this _____ day of December, 1995.

Sam Sparks
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50049

D.C. Docket No. A-95-CV-257

LATREESE TABB
Plaintiff - Appellee-Cross-Appellant

V.

DILLARD, INC.
Defendant - Appellant-Cross-Appellee

Appeals from the United States District Court for the
Western District of Texas, Austin

Before REYNALDO G. GARZA, HIGGINBOTHAM, and JONES, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this Cause is affirmed in part and reversed in part.

IT IS FURTHER ORDERED that each party bear its own costs on appeal.

ISSUED AS MANDATE: May 22, 1997

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-50049

LATREESE TABB,
Plaintiff-Appellee-Cross Appellant,

versus

DILLARD, INC.,
Defendant-Appellant-Cross-Appellee

Appeal from the United States District Court
For the Western District of Texas

(A-95-CV-257)

Before REYNALDO G. GARZA, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:******

The judgment entered on the jury's

******Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

finding of intentional infliction of emotional distress is reversed. The district judge erred in denying defendant motion for a directed verdict and judgment J.N.O.V. on this claim. The evidence does not meet the standard for outrageous conduct under Texas Law. The judgment is otherwise affirmed in all respects.

AFFIRMED in part; REVERSED in part.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-50049

LATREESE TABB
Plaintiff - Appellee-Cross-Appellant

V.

DILLARD, INC.
Defendant - Appellant-Cross-Appellee

Appeal from the United States District Court for the
Western District of Texas, Austin

ON PETITION FOR REHEARING

Before REYNALDO G. GARZA, HIGGINBOTHAM and JONES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

Edith Jones
United States Circuit Judge

Supreme Court, U.S.
FILED
SEP 11 1997
CLERK

No. 97-160

In The

Supreme Court of the United States

October Term, 1996

LATREESE TABB,

Petitioner,

vs.

DILLARD DEPARTMENT STORES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the trial court err in granting the Defendant's Motion for Judgment (N.O.V.) on the employment discrimination claim?

2. Does the propriety of the Court of Appeals' action with respect to the intentional infliction of mental distress cause of action depend upon the wrongful resolution of the discrimination claim?

3. Did the Appellate Court err by reversing the trial court's ruling on the intentional infliction of mental distress claim?

4. Do the rulings of the trial court and the Court of Appeals conflict with a Supreme Court decision, conflict with decisions of other Courts of Appeal, or are they errors which so far depart from the usual and accepted course of judicial proceedings, or sanctions such a departure by the trial court, that it calls for an exercise of this court's power of supervision?

LIST OF PARTIES

Petitioner:

Latreese Tabb

Respondent:

Dillard Department Stores, Inc.

Respondent has no parent companies. Respondent has no non-wholly owned subsidiaries.

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OPINIONS BELOW

Petitioner included in the Petition for Writ of Certiorari transcriptions of the relevant opinions by the trial court and the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF JURISDICTION

Respondent agrees that this Court has jurisdiction over this matter, except that Respondent asserts that the decision of the United States Court of Appeals for the Fifth Circuit does not directly and clearly conflict with any decisions of this Court or other United States Courts of Appeals.

STATUTORY PROVISIONS INVOLVED

The key statutory provisions of Title VII have been adequately set forth in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In addition to information identified by Petitioner, Respondent includes the following information. After Petitioner rested in the trial court, Respondent moved for judgment as a matter of law based, in part, on the fact that Petitioner had not established a prima facie case of discrimination on the basis of race. The trial court carried this Motion. Defendant renewed this Motion at the close of all evidence. Contrary to Petitioner's assertion in Point One in the Petition for Writ of Certiorari, Respondent raised the issue of pretext in its Brief for Cross-Appellee in the Fifth Circuit. Respondent specifically argued that the trial court properly granted Respondent's Motion for Judgment on Petitioner's race discrimination claim because Petitioner had presented no evidence contradicting the series of events leading to Petitioner's termination. Respondent also

argued that Petitioner presented no evidence that the series of events leading to Petitioner's discharge were not the factors which motivated Respondent to discharge Petitioner.

REASONS FOR DENYING THE WRIT

I.

PETITIONER SEEKS REVIEW MERELY OF SUFFICIENCY OF EVIDENCE DETERMINATIONS MADE BY LOWER COURTS.

Petitioner's First Point provides "Did the trial court err in granting the Defendant's Motion for Judgment (N.O.V.) on the employment discrimination claim?" Petitioner's First Point basically requests this Court to review the sufficiency of evidence determinations made by the trial court in the first instance and by the Fifth Circuit on appeal.

Certiorari is not granted to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). Petitioner requests this Court to engage in a detailed fact-based review of the record to determine whether the trial court erred in determining that the evidence was insufficient to support the jury's verdict on Petitioner's employment discrimination claim. Petitioner's First Point also will require that the Fifth Circuit's review of the evidence in determining its insufficiency to support the jury verdict on the race discrimination claim be examined. Petitioner seeks review of evidence sufficiency determinations already made by two courts. In essence, Petitioner requests this Court to review the entire record and conduct its own sufficiency of evidence review.

Petitioner's request for review does not present a situation where the lower courts have applied the incorrect legal standard

in reaching a decision. Even if review of the trial court's decision was appropriate, the trial court in its decision on Respondent's Motion for Judgment cited to the appropriate Fifth Circuit standard for a sufficiency of evidence review. Further, in reaching its conclusion, the trial court facially adhered to the appropriate legal standard by concluding that there was no conflict in substantial evidence regarding the race discrimination claim. At best, Petitioner seeks this Court to review an alleged misapplication of an appropriately cited standard.

The Fifth Circuit's opinion contains no indication that it did not apply the appropriate standard of law in determining that the judgment, other than the judgment on the intentional infliction claim, should be affirmed in all respects. Further, Respondent's challenge in its Motion for Judgment to the existence of a prima facie case as well as Respondent's argument in Cross-Appellees' Brief that no evidence existed to support a finding of pretext provide independent support for the Fifth Circuit's affirmance of the trial court's decision on the race discrimination claim.

II.

THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT THE EVIDENCE DID NOT SATISFY THE STANDARD FOR OUTRAGEOUS CONDUCT UNDER TEXAS LAW.

Petitioner claims that the Fifth Circuit erred in reversing the trial court's denial of Respondent's Motion for Directed Verdict and Motion for Judgment as a Matter of Law on Petitioner's state law intentional infliction of emotional distress claim. Petitioner claims in Point Two that the allegedly erroneous decision on Petitioner's race discrimination claim produced an erroneous decision on the state law intentional infliction claim because a finding of discrimination would support the tort claim.

In Point Three, Petitioner urges review of the Fifth Circuit's determination on the state tort claim because sufficient evidence allegedly existed to support the jury verdict for Petitioner on the intentional infliction claim.

Petitioner's arguments regarding her state law intentional infliction claim are not well founded because the Fifth Circuit correctly determined that insufficient evidence existed to support the jury's finding on the state law tort. Petitioner's argument that an erroneous decision on the discrimination issue resulted in an erroneous determination on the intentional infliction issue assumes that, under Texas law, a finding of discrimination constitutes a finding of outrageous conduct necessary to support the intentional infliction tort. However, courts applying Texas law have rejected the notion that discrimination constitutes outrageous conduct. In *Wilson v. Monarch Paper Co.*, 939 F.2d 1138 (5th Cir. 1991), the Fifth Circuit noted that even conduct which may rise to the level of illegality does not, except in the most unusual circumstances, constitute outrageous conduct. The Fifth Circuit observed that the mere violation of the Age Discrimination Employment Act of 1967 did not constitute outrageous conduct. *Wilson v. Monarch Paper Co.*, 939 F.2d at 1143-45. Other courts applying Texas law have noted that the violation of anti-discrimination or anti-retaliation statutes does not constitute outrageous conduct. *See Cook v. Fidelity Investments*, 908 F. Supp. 438, 440-41 (N.D. Tex. 1995) (Allegations of intentional infliction of emotional distress which were duplicative of race discrimination claim did not give rise to intentional infliction claim); *Gearhart v. Eye Care Centers of America, Inc.*, 888 F. Supp. 814, 819-23 (S.D. Tex. 1995) (Intentional infliction claim which was based on same facts as sex harassment and retaliation claim failed, in part, because conduct was not outrageous); *Beiser v. Tomball Hosp. Auth.*, 902 S.W. 2d 721, 725 (Tex. App. – Houston [1st Dist.] 1995, *writ denied*) (Allegation that company's action violated

whistleblower statute, even if true, did not, as matter of law, constitute extreme and outrageous conduct); *Sebesta v. Kent Electronics Corp.*, 886 S.W. 2d 459, 462-63 (Tex. App. – Houston [1st Dist.] 1994, *writ denied*) (Violation of statute protecting jurors from retaliation in employment not outrageous). Therefore, Petitioner's assertion that a different decision on the race claim would have resulted in a different determination on the state law intentional infliction claim is not supported by Texas law.

Petitioner asserts in Point Three that the Fifth Circuit erroneously concluded that the evidence did not meet the standard of outrageous conduct required under Texas law to support an intentional infliction claim. Petitioner claims that a series of events which occurred at the time of her discharge, and such events are identified in her Petition for Writ of Certiorari, were sufficient to support the jury's finding and, therefore, the Fifth Circuit's decision constituted error requiring intervention by this Court.

The Fifth Circuit correctly determined that the trial court erred in denying Respondent's Motion for Directed Verdict and Motion for Judgment as a Matter of Law because the evidence did not meet the standard for outrageous conduct under Texas law. Specifically, each of the acts or conduct claimed by Petitioner to constitute outrageous conduct, or acts similar to them, have previously been determined not to constitute outrageous conduct under Texas law. Escorting discharged employees from the work premises does not constitute outrageous conduct. *Wornick Co. v. Casas*, 856 S.W. 2d 732, 735 (Tex. 1993); *Sebesta v. Kent Electronics Corp.*, 886 S.W. 2d 459, 464 (Tex. App. – Houston [1st Dist.] 1994, *writ denied*). Reporting an individual to the police and/or having that person arrested does not constitute outrageous conduct. *Halbert v. City of Sherman, Tex.*, 33 F.3d 526, 529 (5th Cir. 1994); *Ledesma for*

Ledesma v. Dillard Dept. Stores, Inc., 818 F. Supp. 983, 985 (N.D. Tex. 1993). Searches incident to lawful arrest are legal. *See, e.g., United States v. Ivy*, 973 F.2d 1184, 1187 (5th Cir. 1992), *cert. denied*, 507 U.S. __, 123 L. Ed. 2d 455 (1993). Petitioner's claim that the timing of her arrest constituted outrageous conduct under Texas law has been rejected. *See Mattix-Hill v. Reck*, 923 S.W. 2d 596, 598 (Tex. 1996); *Sebesta v. Kent Electronics Corp.*, 886 S.W. 2d at 463-64 (No outrageous conduct even though employee alleged, *inter alia*, that exit parade was arranged for busiest part of day). Further, the evidence established that the Petitioner received favorable treatment during the process of her arrest. Given the status of the evidence and the law, the Fifth Circuit correctly determined that the trial court erred in failing to grant Respondent's Motion for Judgment and Motion for Directed Verdict on Petitioner's state law intentional infliction of emotional distress claim.

III.

THE FIFTH CIRCUIT'S DECISION DOES NOT OPENLY AND DIRECTLY CONFLICT WITH ANY RELEVANT DECISIONS OF THIS COURT OR THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

Petitioner asserts that the trial court's and Fifth Circuit's decisions conflict with a previous decision of this Court. Specifically, Petitioner claims in Point Four that the decision of the trial court and Fifth Circuit conflict with this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L. Ed. 2d 407 (1993). Petitioner further asserts that there is a conflict in the Courts of Appeals concerning the proper interpretation of *Hicks* and that this Court should address such conflict.

The Fifth Circuit's opinion affirming the judgment on

Petitioner's race claim does not openly and directly conflict with any decisions of this Court. Petitioner claims that the conflict occurs because the jury was not allowed to infer discrimination even though the trial court noted that there was evidence of pretext. Petitioner apparently assumes that the Fifth Circuit's decision conflicts with *Hicks* because, according to Petitioner, the trial court's decision conflicts with *Hicks*.

Nothing in the Fifth Circuit's single line affirmance on the race discrimination issue compels this conclusion. While the *trial court* did make a statement concerning the existence of evidence of pretext, the *Fifth Circuit* was not bound by the trial court's observation concerning the status of the evidence of pretext. In reviewing a district court's disposition of a motion for judgment as a matter of law, the Appellate Court applies the same test as the district court without any deference to the district court's decision. *Wardlaw v. Inland Container Corp.*, 76 F.3d 1372, 1375 (5th Cir. 1996). The Fifth Circuit neither specifically adopted the trial court's statement that there was evidence sufficient to support a finding of pretext nor concluded that there was evidence of pretext. The Fifth Circuit, exercising its power to review sufficiency of evidence issues, reviewed the evidence and concluded that the evidence was not sufficient to support the jury's verdict on the discrimination claim. Petitioner's assumption that the Fifth Circuit's decision must conflict with *Hicks* is also not compelled simply by the Fifth Circuit's decision since Respondent challenged the existence of evidence to support the elements of a prima facie case and the existence of any evidence of pretext, both matters which provide independent basis for the Fifth Circuit to affirm the judgment on the discrimination claim.

Additionally, the Fifth Circuit's decision is consistent with *Hicks* because of the lack of evidence of all elements of a prima facie case. To the extent that *Hicks* even applies to the review of

a jury verdict, the portion of the *Hicks* decision relied upon by Petitioner dealing with the quantum of evidence of pretext needed to support a finding of discrimination requires both the fact finder's disbelief of the reasons put forth by the employer, particularly if disbelief is accompanied by a suspicion of mendacity, and the elements of the prima facie case. *Hicks*, 509 U.S. at 511. *See also Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1071 (3rd Cir. 1996) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 2532 (1997) (Jury's determination of pretext together with evidence supporting prima facie case will sustain finding of intentional discrimination); *Ryther v. KARE 11*, 108 F.3d 832, 837 (8th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 2510 (1997) (Elements of prima facie case accompanied by evidence of pretext and disbelief of the defendant's proffered explanation may permit jury to find for the plaintiff.) In the present case, a detailed review of the record establishes that no evidence was presented concerning Petitioner's replacement or whether her job was held open following her discharge. Since the record is devoid of any evidence of this element of Petitioner's prima facie case, and since Respondent challenged the existence of a prima facie case in its Motion for Judgment at the close of Petitioner's case, it cannot be said that the Fifth Circuit's decision directly and openly conflicts with *Hicks*.

For the same reasons stated above, the Fifth Circuit's decision also does not openly and directly conflict with any opinions of another Court of Appeals. Nothing on the face of the opinion conflicts with the opinions of other Courts of Appeals. Further, Petitioner's assertion that the decision conflicts with other Courts of Appeals is erroneous since Respondent challenged the existence of evidence to support the elements of a prima facie case and the existence of any evidence of pretext, both which would provide under any Courts of Appeals' decisions independent grounds to affirm the judgment on the discrimination claim.

IV.

THE PRESENT MATTER IS, BECAUSE OF OTHER FACTORS, NOT APPROPRIATE FOR THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI.

In addition to the reasons indicated above, there are other factors about this case which make granting of the Petition for Writ of Certiorari inappropriate. These factors are such that the Petition for Writ of Certiorari should be denied.

A. The Fifth Circuit Correctly Affirmed Granting Of Respondent's Motion For Judgment As A Matter Of Law On Petitioner's Race Discrimination Claim.

The Fifth Circuit correctly affirmed the trial court's granting of judgment as a matter of law on Petitioner's race discrimination claim. While the Fifth Circuit's opinion on appeal contains no specific analysis regarding this claim, the Fifth Circuit's own independent analysis of the evidence would establish that there was no evidence sufficient to support a finding of pretext. Further, a review of the record would establish that there was no evidence sufficient to support a finding that Respondent discharged the Petitioner because of her race. Therefore, the Fifth Circuit correctly affirmed the granting of judgment as a matter of law on Petitioner's race discrimination claim.

B. This Court Has Previously Denied Certiorari In Cases Involving Similar Claims.

Petitioner cites a claimed conflict in the Circuit Courts concerning the application of *Hicks* requiring this court to review the Fifth Circuit's decision. However, this Court has recently denied Petitions for Writs of Certiorari on three occasions on cases dealing with similar issues. *See Ryther v. KARE 11*, 108

F.3d 832 (8th Cir.) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 2510 (1997); *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061 (3rd Cir. 1996) (*en banc*), *cert. denied*, __ U.S. __, 117 S. Ct. 2532 (1997); *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2511 (1997). Each of these Circuit Court decisions contain detailed analysis of facts and law, including in some instances dissenting opinions, from which this Court could determine whether there was any conflict with its previous decisions warranting review. Further, these detailed opinions provided sufficient analysis from which the Court could determine whether a conflict existed on an important issue among the United States Courts of Appeals or whether there was an important question of Federal law which should be settled by the Court. In the present case, the Fifth Circuit's decision contains no analysis above or different from that offered in the above cases and adds nothing to the jurisprudence on this issue which would justify the granting of Petitioner's Writ of Certiorari.

C. Petitioner Seeks Review Of Interpretation Of State Law.

In Points Two and Three, Petitioner requests this Court to review the Fifth Circuit's interpretation and application of Texas tort law. Petitioner requests this Court to conduct a sufficiency of evidence examination to determine whether the evidence introduced at trial was sufficient to establish the outrageousness element of the Texas common law tort of intentional infliction of emotional distress. Petitioner cites to no specific conflict between the Fifth Circuit's decision and a decision of a state court in Texas. Petitioner cites to no conflicting decisions between the Fifth Circuit and another United States Court of Appeals applying Texas law. Given that Petitioner cites no such conflicts, the issues concerning Petitioner's state law tort claim are particularized to this individual case and are not of sufficient

importance beyond the parties in this case to warrant the granting of the Petition for Writ of Certiorari.

D. *Hicks'* Decision Does Not Compel Result Different From Fifth Circuit's Opinion.

Petitioner argues that the trial court and the Fifth Circuit failed to properly apply this Court's decision in *Hicks* and that this failure constituted error warranting review by this Court. Petitioner's argument is flawed because it assumes that this Court's decision in *Hicks* controls the present case. *Hicks* did not involve a case regarding a jury trial, a verdict for plaintiff or the review of a verdict for the plaintiff. *Hicks* held that the employee was not entitled to judgment as a matter of law where the trier of fact, the district judge, disbelieved the employer's proffered reasons for demotion and discharge. Therefore, *Hicks* decided nothing about decisions under Fed. R. Civ. P. 50. *See Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 440-442 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 2511 (1997).

Additionally, Petitioner interprets *Hicks* too narrowly. Interpreting *Hicks* as suggested by Petitioner would completely remove Title VII's requirement of proof of intentional discrimination. *See St. Mary's Honor Center v. Hicks*, 509 U.S. at __, 125 L. Ed. 2d at 416. Title VII would become nothing but a cause of action for perjury and would permit juries to substitute for a finding of intentional discrimination merely a finding that there was evidence that the employer's explanation of the adverse action was unbelievable, two matters cautioned against in *Hicks*. *St. Mary's Honor Center v. Hicks*, 509 U.S. at __, 125 L. Ed. 2d at 421, 425. Applying Petitioner's interpretation of *Hicks* would also be contrary to the actual language of Title VII and its 1991 amendments requiring that discrimination be a motivating factor in employment decisions. Therefore, granting review would be inappropriate.

CONCLUSION

Respondent Dillard Department Stores, Inc. respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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